85-852

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

PRESTON CARROLL COMPANY, INC., and
C.F.W. CONSTRUCTION COMPANY, INC.,
Petitioners for Certiorari

v.

MORRISON ASSURANCE COMPANY, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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v.

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QUESTION PRESENTED

Will Fourteenth Amendment due process protect a party from the retrospective application of state supreme court decisional law which abrogates earlier state supreme court decisonal law upon which that party reasonably relied when retrospective application deprives the party of all opportunities to enforce its rights under a contract?

INDEX

Page

Question Presented i

Index. ii

Table of Authorities iii

Preamble 1

Citations to Opinions Below. 2

Jurisdiction 2

Statutes Involved 3

Statement. 3

Reasons for Granting the Writ. . . .10

Conclusion 22

Appendix A - Statutes 24

B - Opinions and Judgment Below. 27

C - Portions of Pleadings in Courts Below Raising Constitutional Question 41

CITATIONS

I. Cases:

	Page
Balboa Insurance Company v. A. J. Kellos Construction Company, 247 Ga. 393, 276 S.E.2d 599 (1981)	4, 6, 7, 8, 9, 10, 17, 18, 19, 20
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).	21
Brinkerhoff-Faris Trust & Savings Company v. Hill, 74 L.Ed.1107, 50 S.Ct. (1930)	11, 12, 13, 15, 17, 19, 20
Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).	7, 19, 21
Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983)	7
Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145 (1932)	11
Houston General Insurance Company v. Brock Construction Company, 241 Ga. 460, 463, 246 S.E.2d 316, (1978).	8, 9, 10 14, 15, 17, 18, 20
Howard v. Brown, 3 Ga. 523 (1847)	18

Page

Laclede Land & Improv. Co. v. State Tax Commission, 295 Mo. 298 243 S.W. 887 (1922) 16

Morrison Assurance Company v. Preston Carroll Company, Inc., et al., 254 Ga. 608 (1985). 1, 9, 20

Preston Carroll Company, et al., v. Morrison Assurance Company, 173 Ga. App. 412, 326 S.E.2d 486 (1985). 2, 8

Symons Corporation v. Simplicity Builders, Inc., et al., Civil Action No. 786053 (Fulton State Ct., Apr. 13, 1984) 2, 4, 5

II. Statutes:

Fourteenth Amendment to United States Constitution i, 3, 17, 19, 20, 21

28 U.S.C. § 1257(3) 3

O.C.G.A. § 10-7-22 3, 15,

O.C.G.A. § 10-7-24 3, 6, 7, 8, 14, 15, 18

PREAMBLE

Come now the Petitioners, Preston Carroll Company, Inc., and C.F.W. Constructon Company, Inc., (hereinafter referred to as the "Joint Venture")[1] by and through their undersigned counsel, and pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia entered in the case of Morrison Assurance Company v. Preston Carroll Company, Inc., et al., No. 42060 (June 19, 1985), and the denial of said petitioners' motion for rehearing by the Supreme Court of Georgia dated July 23, 1985.

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[1]Pursuant to Rule 28.1, petitioners inform the Court that Preston Carroll Company, Inc., is a wholly-owned subsidiary of Preston Carroll Enterprises, Inc., a Tennessee corporation. CFW Construction Company, Inc., is a wholly-owned subsidiary of Carter, Ltd., a Tennessee corporation.

CITATIONS TO OPINIONS BELOW

The April 13, 1984 Order of the trial court granting respondent's motion for summary judgment against the petitioner Joint Venture is unreported and is printed in Appendix B hereto, infra, p. 27. The opinion of the Georgia Court of Appeals in Preston Carroll Company, Inc., et al. v. Morrison Assurance Company, printed in Appendix B hereto, infra, p. 28, is reported in 173 Ga. App. 412 (326 S.E.2d 486) (1985). The opinion of the Georgia Supreme Court in Morrison Assurance Company v. Preston Carroll Company, Inc., et al., printed in Appendix B hereto, infra, p. 37, is reported in 254 Ga. 608 (1985).

JURISDICTION

The judgment of the Georgia Supreme Court was entered on June 19, 1985,

p. 37, infra. The Joint Venture's motion for rehearing was denied on July 23, 1985, p. 40, infra. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) which allows review by this Court by Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATUTES INVOLVED

The statutory provisions involved are the Fourteenth Amendment to the United States Constitution, O.C.G.A. §§ 10-7-22 and 10-7-24, which statutes are printed in Appendix A, infra, pp. 24-26.

STATEMENT

The Joint Venture petitions this Court for a Writ of Certiorari to the

Georgia Supreme Court to review a decision of the Georgia Supreme Court which has denied the Joint Venture Fourteenth Amendment due process of law by virtue of its retrospective application of its decision of Balboa Insurance Company v. Kellos Construction Company, 247 Ga. 393, 276 S.E.2d 599 (1981), to the Joint Venture which irrevocably deprived the Joint Venture of any opportunity to enforce its rights under a surety bond issued by the respondent Morrison Assurance Company (hereinafter, the "surety").

The Joint Venture alleged such a due process deprivation at the onset in its memorandum of points and authorities in opposition to the surety's motion for summary judgment filed in the trial court in Symons Corporation v. Simplicity Builders, Inc., et al., Civil Action No. 786053 (Fulton State Court) (pp. 51-55).

The Joint Venture renewed its constitutional argument in its

appellant's brief and reply brief filed in the Georgia Court of Appeals (pp. 44-50), which were incorporated into the record upon certiorari to the Georgia Supreme Court. Finally, the Joint Venture reiterated its due process arguments once again orally before the Georgia Supreme Court as well as in writing in the Joint Venture's motion for rehearing (pp. 41-44).

This dispute arose in the context of a suit by an unpaid supplier of the surety's principal, Simplicity Builders, Inc., ("Simplicity"), against the Joint Venture and its bonding company, and Simplicity, and its two bonding companies, one of which was the instant surety. Symons Corporation v. Simplicity Builders, Inc., et al, supra. Earlier, Simplicity had been terminated as a subcontractor of the Joint Venture for non-performance, and the Joint Venture had made demand upon the surety to honor its performance and payment bonds issued in favor of the Joint Venture as obligee.

In response to that demand, the surety in a letter dated March 28, 1980, requested the Joint Venture to initiate suit against the surety's principal, Simplicity, pursuant to O.C.G.A. § 10-7-24 which provides that a surety "any time after the debt on which he is liable becomes due, may give notice in writing to the creditor to proceed to collect the debt from the principal and if the creditor fails to commence an action for the space of three months after such notice the surety giving notice is discharged."

The Joint Venture did not initiate suit against Simplicity in compliance with the surety's notice, and in the subsequent litigation, the Joint Venture asserted breach of contract claims against Simplicity and the surety by cross-claim seeking damages in excess of $200,000. In response, the surety filed a motion for summary judgment invoking the Georgia Supreme Court's decision in Balboa Insurance Company v. A. J. Kellos

Construction Company, supra, claiming a discharge under O.C.G.A. § 10-7-24 due to the failure of the Joint Venture to file suit against Simplicity within three months of the surety's statutory notice. In rebuttal, the Joint Venture in written and oral arguments contended that the 1981 decision in Balboa should not be applied retrospectively to the Joint Venture since to do so would divest it of contract rights in violation of state decisional and federal constitutional law.

Upon appeal to the Georgia Court of Appeals, the Joint Venture argued that the trial court had erroneously applied Balboa retroactively in violation of the doctrine of nonretroactivity as enunciated in the United States Supreme Court's decision of Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), as adopted by the Georgia Supreme Court in Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E.2d 673 (1983), the result

of which was (1) complete and irrevocable disenfranchisement of the Joint Venture's vested rights under a contract; and (2) a violation of the Joint Venture's right to due process under the Fourteenth Amendment.

The Court of Appeals in Preston Carroll Company, et al., v. Morrison Assurance Company, 173 Ga. App. 412 (323 S.E.2d 486) (1985), reversed the trial court's judgment noting that Balboa was inconsistent with the Georgia Supreme Court's earlier holding in Houston General Insurance Company, et al. v. Brock Construction Co., Inc., 241 Ga. 460, 246 S.E.2d 316 (1978) since no case prior to Balboa had actually held that the discharge provision of O.C.G.A. § 10-7-24 applied to compensated sureties, and that the common law of the State of Georgia prior to the enactment of such discharge provision neither compelled the creditors to sue a principal at the request of the surety nor discharged the

surety for the creditor's failure to commence such an action. Since the Balboa holding was not reasonably foreshadowed by the Supreme Court's earlier holding in Houston, the Court of Appeals found that the Joint Venture's reliance upon Houston was justifiable and that retroactive application of Balboa was unwarranted in light of the resulting forfeiture of the Joint Venture's rights under the bond. 175 Ga. App. at 414. The Court of Appeals in applying the doctrine of nonretroactivity in favor of the Joint Venture did not address the Joint Venture's due process argument.

Upon application of the respondent surety, the Georgia Supreme Court took the case under review pursuant to a writ of certiorari, and subsequently reversed the Court of Appeals' decision in Morrison Assurance Company v. Preston Carroll Company, Inc., et al., 254 Ga. 608 (1985) finding that the Balboa

holding was foreshadowed by the language in Houston, and finding therefore that the trial court did not err in granting summary judgment in favor of the respondent surety. The Supreme Court's holding further conspicuously ignored the Joint Venture's due process arguments which had been contained in the record before it, reiterated in oral argument, and further advanced in a motion for rehearing which was denied July 23, 1985.

REASONS FOR GRANTING THE WRIT

1.

The retrospective application of the Georgia Supreme Court's decision in Balboa to the Joint Venture deprives the Joint Venture of all remedies for the enforcement of its rights under the surety's bond in violation of the due process clause of the Fourteenth Amendment.

While prospective or retrospective application of state laws by a state

supreme court is not, in and of itself, violative of the Fourteenth Amendment, Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.Ed. 360, 53 S.Ct. 145 (1932), it will if the law established by the "overruling" decision in combination with the procedural circumstances which existed before the overruling case was decided have the total effect of denying a party all remedies for the enforcement of its rights. Brinkerhoff-Faris Trust & Saving Company v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930).

In Brinkerhoff, appellant bank acting as trustee for its shareholders brought suit in a Missouri State Court against a county tax assessor to enjoin him from collecting a certain portion of the taxes assessed against said shareholders on the share of their bank stock. Alleging discriminatory taxation, the bank contended that it had no other legal remedy under state law.

The trial court refused the injunction and dismissed the bank's complaint without opinions or findings of fact. On appeal, the Supreme Court of Missouri held that the bank had had a legal remedy by which it could have appealed the allegedly discriminatory tax assessment to the state tax commission, and could have obtained a hearing in relief upon its complaint all as provided by state law. As such,the Supreme Court of Missouri held that the bank had had an adequate remedy at law, and affirmed the trial court's judgment.

On certiorari to the United States Supreme Court, the bank pointed out that it had relied upon a Missouri Supreme Court decision issued six (6) years earlier which had held that the state tax commissioner did not have the authority to grant relief from discriminatory taxation, which case had been overruled by the Missouri Supreme Court in the instant Brinkerhoff case,

and under state law it was now too late for the bank to submit the matter to the state tax commissioner.

In short, the bank in Brinkerhoff like the Joint Venture in the case at bar, had relied upon a previous ruling of the highest court in the state in seeking to enforce its rights under state law. Just as in Brinkerhoff where the time had run for the bank to seek an adjustment of the discriminatory tax rates before the state tax commission at the time the Missouri Supreme Court overruled its previous decision, the Joint Venture in the instant case was faced with a similar dilemma wherein what amounts to a three-month statute of limitation was applied to it in making any claim under the bond upon notice to sue from the compensated surety, the instant respondent, and that time had already run. Where the bank in Brinkerhoff, had relied upon the Missouri Supreme Court's earlier decision which had held that the state

tax commissioner had no power to remedy the discriminatory taxation, the Joint Venture similarly relied upon the Houston holding that Title 103 of the Georgia Code Annotated, of which the statutory predecessor[2] of O.C.G.A.

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[2]During this litigation, the Georgia Legislature changed publishers of the Georgia Code. Title 103 of the Georgia Code Annotated entitled "Suretyship" was superceded by Chapter 7 of the Official Code of Georgia Annotated with the same title. Ga. Code Ann. § 103-205 is the statutory predecessor of O.C.G.A. § 10-7-24, and the terms of each statute are identical.

§ 10-7-24 is a part, did not apply to compensated sureties.[3]

In an opinion by Justice Brandise, the Brinkerhoff Court reversed the ruling of the Missouri Supreme Court on the grounds that said court had deprived the bank of due process by depriving it of its only remedy available for the enforcement of its rights to prevent a seizure of its property. The Court noted that if the state court judgment were permitted to stand, the deprivation

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[3]The Georgia Supreme Court in Houston General Insurance Co. v. Brock Construction Company, Inc., 241 Ga. 460, 246 S.E.2d 316 (1978), in a case construing a companion section of Title 103, Ga. Code Ann. 103-203 [O.C.G.A. § 10-7-22], held that Title 103 of the Georgia Code Annotated had not been intended by the Legislature to govern compensated sureties. 241 Ga. at 463. Instead, the Court noted that "the surety law for compensated sureties must be found in the common law of this State," and concluded its analysis by holding that "[w]hether particular rules established under that Title [Title 103] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." 241 Ga. at 464.

of the Bank's property would be accomplished without it ever having had an opportunity to be heard. In reversing the Missouri Supreme Court, Justice Brandise enunciated the following doctrine circumventing the power of state supreme courts to retrospectively apply their decisional law by the constitutional considerations of due process. He stated that:

> Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense--whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the State Court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede Land & Improv. Co. Case [the case upon which the bank had previously relied]. Neither of these matters raises a federal question, neither is subject to our review. But, while it is for the state courts to determine the objective as well as the substantive laws of the state, they must, in so doing accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not

> deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy unless there is or was, afforded to him some real opportunity to protect it. (emphasis added).

280 U.S. at 681-2, 74 L.Ed. 14.

Brinkerhoff applied to the instant case demands the same conclusion. The Joint Venture has been denied its rights to be heard, its day in court, due to the retroactive application of Balboa. Relying as it did upon the Houston holding, the Joint Venture fell victim to the same deprivation which the Brinkerhoff bank experienced in the Missouri Court: a change in the rules so fundamental as to deprive each plaintiff of its constitutional guarantee to due process of law under the Fourteenth Amendment.

Prior to Balboa, the Joint Venture's rights as an obligee to the Morrison performance bond were governed by the terms of that bond as construed by the Houston decision which had held

that Georgia suretyship law contained in Title 103 of the Georgia Code Annotated did not apply ipso facto to compensated sureties but that only when state common law coincided with any particular section of Title 103 would that section be applicable to compensated sureties. Relying on that holding, the Joint Venture did not file suit since at common law a compensated surety had no right to compel suit by a creditor against the surety's principal upon notice to that creditor. Howard v. Brown, 3 Ga. 523, 529 (1847). However, Balboa completely abrogated the Houston holding by applying O.C.G.A. § 10-7-24 to compensated sureties without regard for or even mention of the state's common law.

The results have been unequivocal and dramatic. The Joint Venture's rights under Morrison's bond have been automatically forfeited by the retrospective application to it of the Balboa decision which amounts in this

case for these reasons to a taking without due process of law in violation of the Fourteenth Amendment under Brinkerhoff.

2.

However, the question raised in this petition has acquired an importance which far exceeds the parameters of the instant case.

It presents an opportunity for this Court to clarify its holding in Chevron Oil which implied although failed to state that Fourteenth Amendment due process was an intrinsic consideration of the third prong of its analysis which would deny retrospectivity in order to "preserve [the party's] right to a day in court." 404 U.S. at 108, 92 S.Ct. at 356.

The Georgia Supreme Court, although presumably paying lipservice to Chevron Oil in noting that "the Balboa

resolution was foreshadowed by the language used in Houston,"[4] completely ignored the constitutional ramifications of its decision notwithstanding the unquestionable deleterious affect which its decision had on the rights of the Joint Venture. Brinkerhoff mandates the intervention of Fourteenth Amendment due process when a state's judiciary deprives a party of all existing remedies for the enforcement of a property right where that party has had no opportunity to protect it. 28 U.S. at 682, 74 L.Ed. at 1114.

Clearly the Joint Venture was deprived of that opportunity by the retrospective application of Balboa by the Georgia Supreme Court. In doing so, the Georgia Supreme Court ran roughshod over the Joint Venture's rights to due process under the Fourteenth Amendment, "the root requirement" of which is "that

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[4]Morrison Assurance Company v. Preston Carroll Company, Inc., et al., 254 Ga. 608, 609 (1985).

an individual be given an opportunity for a hearing before he is deprived of any significant property interest." (emphasis added). Boddie v. Connecticut, 401 U.S. 371, 379, 91 SCt. 780, 786, 28 L.Ed. 2d 113 (1971).

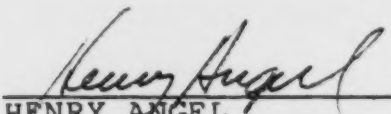
Certainly if Fourteenth Amendment due process is to have any practicable viability outside of the federal courts in the protection of property interests within the Chevron Oil doctrine of nonretroactivity it must be reckoned with when those property rights are forfeited by the retrospective application of state decisional law.

In short, this case poses the rather unique question as to the limits of state decisional power, the exercise of which results in the forfeiture of contract rights where a party has not only had no opportunity to be heard, but has had no real opportunity to exercise its rights under state law in the protection of that right to be heard.

CONCLUSION

For the foregoing reasons the Petitioner Joint Venture urges the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted,

By: 
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AFFIDAVIT OF SERVICE

Comes now Henry Angel, who after being duly sworn deposes and states:

I have this day served Dewitte Thompson, Esq., Attorney for Morrison Assurance Company with three copies of this amended PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA by depositing copies of same in the United States Mail with adequate postage thereon addressed as follows:

Dewitte Thompson, Esq.
Suite 480, 300 Buckeye Road
Atlanta, Georgia 30341

This 14th day of November, 1985.

Henry Angel
HENRY ANGEL
Attorney for Petitioners

Sworn to and subscribed before me this 14th day of November, 1985.

Judith F. Rubling
Notary Public
Notary Public, Georgia, State at Large
My Commission Expires July 25, 1987

APPENDIX "A"

1. AMENDMENT XIV - . . .
   DUE PROCESS . . .

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 USC § 1257. STATE COURTS; APPEAL; CERTIORARI

Final Judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commisson held, or authority exercised under, the United States.

3. O.C.G.A. § 10-7-22. DISCHARGE OF SURETY BY INCREASE OF RISK.

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to

prosecute with vigor his legal remedies, unless for a consideraion, shall not release the surety.

4. O.C.G.A. § 10-7-24. REFUSAL TO SUE PRINCIPAL AFTER NOTICE BY SURETY AS DISCHARGE

Any surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation, to proceed to collect the debt from the principal or any one of the several principals liable therefor; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged. . . .

APPENDIX "B"

1. SYMONS CORPORATION V. SIMPLICITY BUILDERS, INC., ET AL., CIVIL ACTION NO. 786053 (FULTON STATE CT., APRIL 13, 1984).

"This case having been brought before this Court on Morrison Assurance Company's Motion for Summary Judgment with respect to the cross-claim of defendants Preston Carroll Company, Inc., d/b/a Preston Carroll Construction & CFW Construction Company, arguments by both parties having been heard, it is hereby ORDERED

That the Motion for Summary Judgment is granted, there being no genuine issue of a material fact and Morrison Assurance Company is entitled to Judgment in its favor as a matter of law.

SO ORDERED, this 13th day of April, 1984.

CHARLES R. CARNES, JUDGE
Fulton State Court

2. 69086. PRESTON CARROLL COMPANY, INC., ET AL., v. MORRISON ASSURANCE COMPANY, 173 Ga. App. 412, 326 S.E2d 486 (1985).

Deen, Presiding Judge.

"The appellants, Preston Carroll Company, Inc. and CFW Construction Company, Inc., formed a joint venture and contracted with the Clayton County Water Authority for the construction of a waste water effluent field. On May 10, 1979, the appellants entered into several subcontracts with Simplicity Builders, Inc. (Simplicity), for part of the work under the water authority contract. The appellee, Morrison Assurance Company, a compensated surety, issued performance and payment bonds for Simplicity's sake, in the amounts of $171,814 and $79,699.

On February 25, 1980, the appellants terminated the various subcontracts with Simplicity due to the latter's alleged multiple breaches of the contract. Subsequently, the

appellants requested that the appellee honor the performance and payment bonds by completing Simplicity's work and paying the outstanding bills for materials. On March 28, 1980, the appellee demanded that the appellants first initiate suit against Simplicity; the appellants never heeded the demand.

On March 4, 1981, an unpaid supplier of Simplicity filed suit against the appellants, Simplicity, and their respective bonding companies. The appellants in turn asserted a cross-claim against the appellee for its refusal to honor the performance and payment bonds. The appellee eventually moved for summary judgment on the cross-claim, on the basis that it was discharged from its obligations under its performance and payment bonds because of the appellant's failure to file suit against Simplicity within three months of the surety's demand, and this appeal followed from the trial court's grant of that motion. Held:

O.C.G.A. § 10-7-24 (formerly Code Ann. § 103-205) provides that "[a]ny surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor. . . to proceed to collect the debt from the principal . . .; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged." On April 8, 1981, the Supreme Court held that this section applies to compensated as well as uncompensated sureties. Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599 (1981).

In the instant case, it is undisputed that the appellants failed to proceed against Simplicity (which was within the state's jurisdiction) within

three months of the notice given by the appellee in March, 1980. Under the above authority, without more, the appellee would be entitled to summary judgment as a matter of law.

However it also appears uncontroverted that, in failing to commence any action against the principal following the notice given by the surety, the appellants relied upon Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), in which the Supreme Court held that Title 103 does not apply to compensated sureties. That court pointed out that "the surety law for compensated sureties must be found in the common law of this state. We note that Title 103 is largely a codification of the common law of surety and principal, and that many of the rules of surety law are the same or similar for compensated and uncompensated sureties. Thus we will look to Title 103, and the cases decided thereunder, as persuasive authority as

to the law governing compensated sureties. Whether particular rules established under that Title differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Id. at 463-464. No case prior to Balboa held that the discharge provision of Code Ann. § 103-205 (now O.C.G.A. § 10-7-24) applied to compensated sureties, and the common law in this state prior to the enactment of any such discharge provision neither compelled a creditor to sue a principal at the request of the surety nor discharged the surety for the creditor's failure to commence such an action. Howard v. Brown, 3 Ga. 523 (1847); Thomas v. Clarkson, 125 Ga. 72, 78 (3) (54 SE 77) (1906).

Although the Balboa court did not expressly overrule Houston Gen. Ins. Co. v. Brock Constr. Co., supra, it cannot be denied that the two holdings are contrary. The crux of the instant case therefore involves determining

which rule governs this particular dispute between the appellants and the appellee.

The overruling of a decision is generally retroactive, but retroactive application of a decision overruling a prior decision may be declined where unjust results would accrue to those who justifiably relied upon the prior rule. Walker v. Walker, 247 Ga. 502 (277 SE2d 45) (1981). See also Mutual Life Ins. Co. of N.Y. v. Barron, 70 Ga. App. 454, 463-464 (28 SE2d 334) (1943), and Flewellen v. Atlanta Cas. Co., 250 Ga. 709 (300 SE2d 673) (1983). At all pertinent times in this case, i.e., at the creation of the suretyship and notice by the surety demanding suit against the principal, the most recent pronouncement by the Georgia Supreme Court provided that Tile 103, which, of course, included the discharge provision in question, did not apply to compensated sureties. We therefore consider the appellants' reliance upon

that pronouncement to be justifiable, and the injustice of applying Balboa retroactively and thereby discharing the surety is obvious. Accordingly, we conclude that retroactive application of Balboa in this case was error and that summary judgment for the appellee was inappropriate."

Judgment reversed. Banke, C.J., McMurray, P. J., Pope and Benham, JJ., concur. Birdsong, P.J., Carley, Sognier and Beasley, JJ., dissent.

DECIDED JANUARY 8, 1985 -
REHEARING DENIED FEBRUARY 1, 1985 -
CERT. APPLIED FOR.

SOGNIER, Judge, dissenting.

"I respectfully dissent. The majority has determined that the Supreme Court's decision in Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599) (1981) implicity overruled its earlier decision in Houston &c. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), and

by declining to apply Balboa retroactively, the indirect effect of the majority's opinion is to hold that the Supreme Court in Balboa established a new principle of law. See Flewellen v. Atlanta Cas. Co., 250 Ga. 709, 712 (300 SE2d 673) (1983).

I disagree. I find nothing contrary in the decisions of Balboa and Houston. Moreover, I find that the Balboa decision did not estalbish a new principle of law, but was instead, clearly foreshadowed by the warning in Houston that "[w]hether particular rules established under that Title [former Title 103, now O.C.G.A. § 10-7-1 et seq.] differ from the law to be applied to compensated sureties must be decided on a case-by-case basis." Id. at 464. (Emphasis supplied.)

Therefore I cannot agree with the majority's refusal to apply Balboa retroactively. In Flewellen, supra, which adopted the test in Chevron Oil Co. v. Huson, 404 U.S. 97 (92 SC 349, 30

LE2d 296) (1971) for retroactivity the Supreme Court stated that in deciding a retroactivity question the court should: "Consider whether the decision to be applied nonretroactively established a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." Flewellen, supra, at 712. Balboa did not explicitly overrule any past precedent, and while the issue may have been one of first impression, the Balboa resolution was foreshadowed by the language used in Houston, supra at 464.

Although I feel that the Supreme Court's decision in Balboa is harsh in requiring one who has paid a surety to take additional steps before collecting from that surety the benefits for which one has paid, nevertheless the holding in Balboa is the law and we are constrained to follow it. I would

affirm the trial court's grant of appellee's motion for summary judgment.

I am authorized to state that Presiding Judge Birdsong, Judge Carley and Judge Beasley join in this dissent."

3. 42060. MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, INC., ET AL., 254 Ga. 608 (1985).

MARSHALL, Presiding Judge.

"We granted certiorari to resolve a perceived conflict between Houston Gen. Ins. Co. v. Brock Constr. Co., 241 Ga. 460 (246 SE2d 316) (1978), and Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393 (276 SE2d 599) (1981), in the 5-4 decision of the Court of Appeals in Preston Carroll Co. v. Morrison Assur. Co., 173 Ga. App. 412 (326 SE2d 486) (1985). The facts of the case are set out so far as they are material in the opinion of the Court of Appeals.

The issue is whether the legislature intended that compensated as well as uncompensated sureties be

governed by the provisions of Code Ann. § 103-205 (now O.C.G.A. § 10-7-24).[1] In Houston, supra, the court ruled on Code §§ 103-103, -203 (now O.C.G.A. §§ 10-7-3,-22) in Div.2, holding that they do not apply to compensated sureties. Although the focus was on those specific Code Sections, the court, in Div. 1, examined all of Title 103 and affirmed the ruling of the Court of Appeals "that Title 103 [with the exception of Code Ann. § 103-210] was not intended to govern compensated sureties." Houston, supra, p. 463. To

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[1] "Any surety, guarantor, or endorser, at any time after the debt on which he is liable becomes due, may give notice in writing to the creditor, his agent, or any person having possession or control of the obligation to proceed to collect the debt from the principal or any one of the several principals liable therefor; and, if the credtor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged . . ."

the extent that that ruling is broader than the specific issue in that case, i.e., as to Code §§ 103-103, -203, it is obiter dictum. That there was no intention to include the entire Title within the purview of that decision, is illustrated by the holding, on p. 464, that "Whether particular rules established under that Title differ from the law to be applied to compensated sureties must be decided on a case-by-case basis."

Balboa, 247 Ga. 393, supra, dealt solely with the issue of whether Code Ann. § 103-205 applies to compensated sureties (which we answered in the affirmative). We recognized, on p. 394, that the general ruling on all of Code Ann. Title 103, which we have quoted herein above from the Houston case, undoubtedly had prompted that certified question. Thus, as the dissenting opinion in the Preston Carroll Co. case, supra, stated it, Balboa, supra, did not explicitly overrule any past precedent

(including Houston, supra) and while the issue may have been one of first impression, the Balboa resolution was foreshadowed by the language used in Houston, supra at p. 464.

Accordingly, the trial court did not err in granting summary judgment in favor of the appellant surety, and the judgment of the Court of Appeals reversing the trial court's judgment must be, and is, reversed."

Judgment reversed. All the Justices concur.

DECIDED JUNE 19, 1985 -
REHEARING DENIED JULY 23, 1984.
Certiorari to the Court of Appeals of Georgia - 173 Ga. App. 412.

4. 42060. MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, INC., ET AL., (Ga. Sup. Ct., July 23, 1985).

"The Motion for a Rehearing was denied today."

Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX "C"

Excerpts from pleadings filed by Petitioners in state courts below raising the constitutional question:

1. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REHEARING FILED IN SUPREME COURT OF GEORGIA ON JULY 1, 1985, IN MORRISON ASSURANCE COMPANY V. PRESTON CARROLL COMPANY, ET AL., CASE NO. 42060.

"Appellees Preston Carroll Company, Inc. and CFW Construction Company, Inc. (hereinafter referred to as the "joint venture"), respectfully urge the Court for a rehearing of the Court's June 19, 1985 decision reversing the Court of Appeals in Preston Carroll Company, et al. v. Morrison Assurance Company, 173 Ga. App. 412 (1985), for the following reasons:

. . .

Although not specifically addressed in either majority or minority opinions

of the Court of Appeals, nor commented upon by the trial court, the joint venture nevertheless in each forum as in this one has argued that the retrospective application of Balboa to the joint venture would constitute a violation of the due process clause of the Fourteenth Amendment. Hence, retrospective application of Balboa not only is in derogation of the doctrine of nonretroactivity as adopted by this Court in Flewellan, the constitutional ramifications to the joint venture of such application is even of more serious import.

While prospective or retrospective application of state laws by a state supreme court is not, in and of itself, violative of the Fourteenth Amendment, Great Northern Railway Company v. Sunburst Oil & Refining Company, 287 U.S. 358, 77 L.Ed 360, 53 S.Ct. 145 (1932), it will if the law established by the "overruling" decision in combination with the procedural

circumstances which existed before the overruling case was decided has the total effect of denying a party all remedies for the enforcement of its rights. Brinkerhoff-Faris Trust & Saving Company v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 51 (1930).

. . .

It is respectfully submitted that Brinkerhoff applied to the instant case demands the same conclusion. The joint venture has been denied its right to be heard, its day in court, due to the retroactive application of Balboa. Relying as it did on the Houston holding, the joint venture fell victim to the same deprivation which the Brinkerhoff bank experienced in the Missouri Courts: a change in the rules so fundamental so as to deprive each plaintiff of its const utional guarantee to due process of law.

Prior to Balboa, the joint venture's rights as an obligee to the

Morrison performance bond were governed by the terms of that bond. With Balboa, Morrison found additional protection under Ga. Code Ann. § 103-205 as a compensated surety, and the joint venture's rights under Morrison's bond were irrevocably forfeited by the application to it of the ninety (90) day notice provisions of that statute after the fact. As such, if this Honorable Court's decision stands, the joint venture will be deprived of any opportunity to assert its rights under the bond which amounts in this case, for these reasons, to a taking without due process of law in violation of the Fourteenth Amendment. . . ."

2. REPLY BRIEF FILED IN GEORGIA COURT OF APPEALS ON SEPTEMBER 7, 1984 IN PRESTON CARROLL COMPANY, INC., ET AL. V. MORRISON ASSURANCE COMPANY, CASE NO. 69086.

. . .

"In conclusion, the Joint Venture would point out to the Court that the

retrospective application of Balboa alone or in conjunction with the retrospective application of the 1981 Amendment to the Joint Venture are proscribed by case and statutory authority and constitute an unconstitutional interference with contract rights in violation of both State and Federal Constitutions.

CONCLUSION

In conclusion, Morrison's brief raises two critical questions in the instant appeal: (1) should the Balboa decision be applied retroactively to the Joint Venture in light of the Georgia Supreme Court's adoption of the Chevron Oil test for the applicability of the doctrine of nonretroactivity, and (2) whether the retrospective application of Balboa by itself or in conjunction with the 1981 Amendment to Ga. Code Ann. § 103-101 is in violation of both State and Federal proscriptions against the application of ex facto

laws, the result of which is a taking of property rights without due process of law. For the reasons above, the Joint Venture strongly urges the Court to answer both questions in the affirmative, reversing the trial court's Order granting Morrison's Motion for Summary Judgment."

3. BRIEF FILED IN GEORGIA COURT OF APPEALS ON JULY 2, 1984 IN PRESTON CARROLL COMPANY, INC., ET AL. V. MORRISON ASSURANCE COMPANY, CASE NO. 69086.

. . .

ENUMERATIONS OF ERROR

1.

"THE TRIAL COURT ERRED IN GRANTING APPELLEE MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT SINCE GRANTING THE MOTION CONSTITUTED A RETROACTIVE APPLICATION OF A GEORGIA SUPREME COURT DECISION WHICH REVERSED AN EARLIER GEORGIA SUPREME COURT DECISION UPON WHICH THE APPELLANTS JUSTIFIABLY RELIED, AND UPON WHICH THE APPELLANTS' CONTRACTUAL RIGHTS HAD ALREADY VESTED.

THE TRIAL COURT ERRED IN GRANTING APPELLEE MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT SINCE GRANTING THE MOTION CONSTITUTED A RETROACTIVE APPLICATION OF A STATE STATUTE IN VIOLATION OF STATE AND FEDERAL CONSTITUTIONS.

. . .

It is clear under the State Constitution a statute does not apply retrospectively unless the General Assembly expressly provides for such application in futher proceedings and pending cases. Article I, Section III, Para. II (O.C.G.A. § 1-3-5). (Footnote omitted).

Enger v. Irwin, 245 Ga. 753 (1980). As stated by the Georgia Supreme Court in Todd v. Morgan, 215 Ga. 220 (1959), a statute is "retroactive" in its legal sense which

creates a new obligation on transactions or considerations already passed, or destroys or impairs vested rights. "Upon principle, every statute which takes away or impairs vested rights required under existing laws or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already passed, must be deemed retrospective." Id. at 222. The Enger Court quoting from its previous decision in F. H. Ross & Co. v. White, 224 Ga. 324 (1968), stated that "[i]t is well settled that a statute affecting substantive rights operates prospectively." Code § 102-104 [O.C.G.A. § 1-3-5]. Enger, supra, at 754. See, e.g., Hart v. Owens-Illinois, Inc., 161 Ga. App. 831 (1982).

On April 9, 1981, Ga. Code Ann. § 103-101 which previously distinguished between the surety (uncompensated surety) and guarantor (compensated surety) was repealed, and the following statute was passed in its place:

> 103-101. Definition. The contract of suretyship or guaranty is one whereby a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit or indulgence or other benefit given to his principal, the principal in either instance remaining bound therefor. Sureties, including those formally called guarantors, are jointly and severally liable with their principal unless the contract provides otherwise. There should be no distinction between contracts of suretyship and guaranty. [O.C.G.A. § 10-7-1].

To grant Morrison's motion is to give retrospective application of O.C.G.A. § 10-7-1, as amended, abolishing the distinction between guarantors and sureties, which in effect is to apply the protection of Ga. Code Ann. § 103-205 to compensated sureties. Such retrospective application is in violation of state statutory and appellate authority. It cannot be disputed that such an interpretation would irreparably destroy any

substantive rights which the joint venture had under its payment and performance bonds. There is no question that the joint venture did not initiate legal action against Morrison's principal within three months of the joint venture's notice to do so by the surety. The issue then is whether the 1981 version of Ga. Code Ann. § 103-205 abolishing the distinction between sureties and guarantors would be given effect where the obvious conclusion from the application of the earlier Houston decision would result in the opposite conclusion. That is, that Title 103 is not applicable to compensated sureties. Secondly, that in reference to the undisputed common law of Georgia confirms the inapplicability of this statute to compensated sureties." (Footnote omitted). . . .

4. MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MORRISON ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT FILED IN THE STATE COURT OF FULTON COUNTY ON APRIL 13, 1984, IN SYMONS CORPORATION V. SIMPLICITY BUILDERS, INC., ET. AL., CASE NO. 786053

. . .

"Thirdly, applying the Balboa decision retrospectively would constitute an unconstitutional taking of property of the joint venture without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

. . .

Even without regard to the retrospective application of O.C.G.A. Section 10-7-1 to compensated sureties, it is nevertheless clear under a legion of Georgia appellate authority that on these facts the retrospective application of the Georgia Supreme

Court's decision in Balboa is not only unwarranted under State law but also constitutes an unconstitutional taking of property without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

As explainted above, the Georgia Supreme Court in Balboa expressly recognized in its holding that O.C.G.A. Section 10-7-24 did in fact apply to compensated sureties was in direct contravention to what it stated ealier in its Houston decision when it made the blanket assertion that "with the exception of Code Ann. Section 103-210 (enacted in 1973), (Tile 103) 'was not intended to govern compensated sureties.'" 247 Ga. at 394.

While the general rule in the State of Georgia appears to be that the effect of a judicial reversal of earlier decisions is retrospective, there is an exception to the general rule as recognized by the Georgia Court of Appeals in Mutual Life Insurance Co. v.

Barron, 70 Ga. App. 454, 463-64 (1943), which is that

> [a]n overruling decision cannot operate retrospectively so as to impair the obligations of contracts entered into, or injuriously affect vested rights acquired in reliance on the overruled decision. 21 C.J.S. 328, § 194.

It is clear that the joint venture's rights under the performance and payment bonds were vested upon the execution of said bonds, and its actions to enforce those rights were dictated by the Georgia Supreme Court's decision in Houston. For the Court to apply Balboa retrospectively would result in the divestiture of the joint venture's rights.

A second exception to the general rule cited in Barron, supra, has been enunciated by the Georgia Supreme Court in Walker v. Walker, 247 Ga. 502 (1981). That is where "unjust results" would come to those who justifiably relied on the earlier decision. . . .

It is clear that the surety relies heavily on the Balboa decision as support for its motion for summary judgment. It is equally clear that the retrospective application of the Balboa decision in the instant case will not only destroy those vested contractual rights acquired by the joint venture under the payment and performance bonds in accordance with the construction of O.C.G.A. Section 10-7-24 of the Houston decision, but that retrospective application of Balboa will clearly and unquestionably constitute a grave injustice to the joint venture which had justifiably relied upon the prior Houston decision.

CONCLUSION

Therefore, there is amply authority for both propositions which the joint venture asserts in opposition to the surety's motion for summary judgment. First, for the Court to apply Section 10-7-24 to the instant

compensated surety will in actuality be applying the 1981 statute abolishing the distinction between sureties and guarantors to the instant case, O.C.G.A. Sec. 10-7-1, in violation of both state and federal constitutions and controlling appellate authority. . . .

Finally, it would constitute an unconstitutional taking of contractual property rights of the joint venture without due process of law in violation of the Fourteenth Amendment of the United States Constitution."